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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1204

PEARSON CANDY CO., A DIVISION OF W.R. GRACE & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 471 F. 2d 11. The Board's decision and order (Pet. App. 3-16) are reported at 187 NLRB No. 62. The Regional Director's determinations in the underlying representation proceeding (R. 18-20, 67-69, 110-111)[1] are unreported.

JURISDICTION

The decision of the court of appeals was entered on December 6, 1972 (Pet. App. 1). The petition for a writ

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[1]"R." refers to Volume I of the record in the court below. A copy has been lodged with the Clerk.

of certiorari was filed on March 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's campaign literature tended to interfere with employee free choice in the first Board election, but that the union's literature did not have that effect in the second election.

2. Whether the Board properly ruled on the employer's objections to the election and the union's request to amend its certification without holding evidentiary hearings.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 19-22.

STATEMENT

On October 28, 1968, the Bakery & Confectionary Workers International Union of America, Local 400, International Brotherhood of Teamsters, filed a petition for a representation election among the production and maintenance employees at the Company's Culver City plant, where it manufactures candy (R. 6). On November 15, the Board's Regional Director approved an Agreement for Consent Election between the Company and the Union (R. 7-8), which provided that the Regional Director's determination shall be final and binding as to "any question * * * raised by any party [to the election] relating in any manner to the election"; the "method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith"; and

any "rulings or determinations * * * in respect [to] any amendment of any certification * * *" (R. 7-8, paragraphs 1 and 6).

The Regional Director conducted an election on December 10, 1968, which resulted in a vote of 23 for, and 28 against, the Union. The Union filed timely objections to the election, alleging, *inter alia,* that the Company had distributed a handbill to its employees, on the day of the election, which contained "threats and material misrepresentations" (R. 12-15).

Pursuant to applicable Board procedure,[2] the Regional Director conducted an administrative investigation, affording all parties involved a full opportunity to submit evidence relating to the Union's objections. On April 30, 1969, the Regional Director issued a Report on Objections and Direction of Second Election (R. 18-20). The Director found that the assertions in

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[2]See 29 C.F.R. 102.69.

the Company's handbill[3] "bear the connotation that voting for the [Union] necessarily would cause the enumerated conditions to become obligatory upon the employees" and that this "connotation is untrue" (R. 19). Thus, the statements assumed that the Company would agree to a union security provision and that such provision would "automatically require the conditions described in the leaflet" (*ibid.*). But, whether the Company would agree to any contract was speculative, and "[e]ven a full union security provision does not require that the employee assume the obligations of union membership but merely that he pay the initiation

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[3]The handbill (R. 16) advised the employees:

VOTE NO -AGAINST THE UNION IF YOU DON'T WANT:

1. To pay your own money to join a union;
2. To pay union dues out of your check;
3. Only one raise each year;
4. To go to union meetings at night on your own time;
5. To pay a fine if you don't go to meetings;
6. To pay a fine if you don't pay your dues;
7. To be discharged if you don't join the union;
8. To lose money by going on strike when the union orders you to go;
9. To walk a picket line when ordered by the union;
10. To be told to take your problems (personal or business) to a union steward and not be able to talk to your supervisor or the company manager;
11. To be forced to tell on your friends and fellow workers whenever they break a union rule (the union constitution says you must be a tattle-tale or you can be required to pay a fine);
12. To pay extra money to the union when it decides it hasn't enough money to pay its officers;
13. To be held back from getting more money because of union rules;
14. Impersonal working conditions;
15. Your basic freedom of opportunity restricted.

fees and dues uniformly required as a condition of such membership" (*ibid.*). The Director therefore concluded that the Company's "handbill passed out on the day of the election asserted material and misleading representations of the law at a time when an effective reply was impossible" (*ibid.*). He set aside the December 10 election and ordered that a second election be conducted (R. 20).

The Company filed with the Board a Request for Review (R. 21-25). On May 14, 1969, the Board advised the Company that, since it had agreed that the determination of the Regional Director on all questions relating to the consent election would be "final and binding upon any question * * * raised by any party hereto relating in any manner to the election," the Board would not entertain an appeal from the Director's actions pursuant to that agreement (R. 136).[4]

The Union won the second election, held on August 7, 1969, by a vote of 31 to 14 (R. 36). The Company filed objections, alleging, *inter alia,* that, shortly before the voting was scheduled to commence, the Union dis-

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[4]See 29 C.F.R. 102.62, 101.19(a).

tributed among the employees a handbill[5] containing "material misrepresentations concerning the nature and significance of the election, the benefits which allegedly had been negotiated" by the Union in the candy industry, and "the availability of said benefits as an automatic consequence of the election" (R. 38). The Regional Director, after an administrative investigation, found that, on August 5, 1969, the Union mailed to the unit employees a handbill which "presumably

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[5]The handbill stated (R. 41):

DEAR PEARSON EMPLOYEES:

You are all aware that the N.L.R.B. election is to be held Thursday, August 7th at the plant from 3:00 to 3:45 P.M. Your right to make a free choice in a democratic fashion is "the American way of life."

Immediately following certification of the election, all Pearson employees will be called into a membership meeting. At this meeting you, as a group, will draw up contract proposals. Following that, negotiations to establish a contract will get under way.

LOCAL 400 has negotiated for its members:

Dental Plan

Hospitalization including major Medical up to $10,000

Pension Plan

Prescription Drug Plan

Excellent working conditions

Highest wages in the Candy Industry

Night Compensation pay

Sick leave benefits

Guaranteed seniority for job protection at its best

SECURE THESE BENEFITS BY JOINING LOCAL 400

Just a final word to you: This election is completely secret.

VOTE WITH CONFIDENCE

Vote *YES* for Local 400, it means Victory for you!!

was received by them on August 6th or 7th" (R. 68). He further found that "the handbill nowhere alleges that all the enumerated benefits are conferred in its candy industry contracts," that the Union's contracts reveal that "in fact they have negotiated each of the items claimed," and that a "careful reading of the handbill fails to reveal any misrepresentation concerning the nature or significance of the election or the availability of benefits as an automatic consequence of the election" (*ibid.*). The Regional Director therefore overruled the Company's objections, and certified the Union as the collective bargaining representative of the Company's employees (*ibid.*).

The Company filed with the Board a Request for Review, alleging that the Director had acted arbitrarily and capriciously. The Regional Director, treating the Company's request as a motion for reconsideration, granted it and conducted a further administrative investigation.[6] Based on this investigation, the Director, on November 5, 1969, decided to adhere to his earlier decision overruling the Company's objections and certifying the Union. The Director rejected the Company's contention that the Union falsely represented that it had negotiated the highest wages in the candy industry, finding that a comparison of the Company's wage rates with those contained in the Union's contract with See's Candy Shops, Inc.—upon which the Union's claim had been based—indicated that See's contract rates were in many instances higher than the

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[6]In response to a request by the Regional Director for more information concerning the allegations made in its Request for Review, the Company requested a hearing to resolve unspecified " 'substantial and material factual issues.' " The Director denied this request, finding that there were "no unresolved or disputed factual issues" which "might affect the findings and conclusions" made in his decision (R. 98, n. 7).

Company's (R. 98). The Director further found, contrary to the Company's assertions, that the Union's leaflet did not state that the benefits referred to therein "are an automatic consequence of union membership or that union membership would be an automatic consequence of the election * * *" (R. 99).

On April 27, 1970, the Union petitioned the Regional Director to change the name of the certified bargaining agent to reflect the change in the affiliation of its parent international from the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America to the AFL-CIO (R. 103-104). After an administrative investigation, the Regional Director issued a Notice to Show Cause, reciting the facts revealed by his investigation and indicating his intention to grant the request to change (R. 105-106). The Company opposed the amendment on the grounds that the employees in the bargaining unit did not have an opportunity to participate in the decision to change the affiliation of the International Union, and that a new election should be conducted because the change in affiliation resulted in the Union becoming a "totally different entity" than it was at the time of its certification (R. 107-109). On June 30, 1970, the Regional Director ordered that the certification be amended as requested (R. 110-111).[7] The Board denied (R. 118) the Company's appeal (R. 112-115) from the order amending the certification.

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[7]In concluding that the Union was entitled to an amended certification, the Regional Director found that, despite the change in affiliation of the International Union, the officers and functional leaders of Local 400 had remained the same, there had been no change in the structure, functions or general membership of Local 400, and the constitution, by-laws, and bargaining authority of Local 400 had remained unaffected. He also noted that the Company had not alleged that the employees did not wish to continue to be represented by Local 400. Finally, the Director found that the absence of employee participation in the decision to change affiliation was immaterial, as the change involved, not the certified local union, but the International Union with which it was affiliated. (R. 110-111.)

Thereafter, the Company refused to bargain with the Union, and an unfair labor practice complaint issued alleging that the Company had violated Section 8(a)(5) and (1) of the Act (R. 116, 119-122). On December 24, 1970, the Board, finding that there were no issues that had not been decided in the representation proceeding, granted the General Counsel's motion for summary judgment (Pet. App. 7-8). The Board ordered the Company to bargain with the Union upon request (Pet. App. 13).[8]

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1-2).

ARGUMENT

1. The first question raised in the petition (Pet. 2)—whether "the Board's discretion under Section 9 of the National Labor Relations Act [is] so broad as to permit the application of inconsistent standards to employers' and unions' pre-election campaign propaganda"—is not presented here. The court of appeals found that the Company's contention "that the Regional Director applied a double standard, holding the company to a higher degree of accuracy in its propaganda than he demanded of the local," was "not

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[8]On March 5, 1971, the Company filed a Motion for Reconsideration, alleging that it had discovered new evidence in the case subsequent to the Board's Decision and Order, that the Board had misconstrued a central issue in the amendment to the certification case, and that the Board should remand the proceeding to the Regional Director for a hearing and further reconsideration of the case (R. 186-195). The Board denied the Company's Motion, concluding that the "newly discovered evidence does not require or warrant changing the Board's Decision and Order * * * as it contains nothing not previously considered by the Board" (R. 199-200).

borne out by the record" (Pet. App. 2). Thus, the only issue really presented is whether the Regional Director properly concluded that the Company's propaganda in the first election tended to interfere with employee free choice, while that of the Union in the second election did not. Such an issue, which turns on the facts of the particular case, does not warrant further review. "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767. As shown (*supra*, pp. 3-8), the Regional Director had rational grounds for evaluating the Company's propaganda differently from the Union's.

2. Petitioner's further contention (Pet. 11, 13) that it was entitled to an evidentiary hearing on its objections to the second election is predicated on the premise that they presented material issues of fact. But, as shown (*supra*, p. 7), petitioner did not contest the facts disclosed by the Regional Director's administrative investigation, but only the conclusion which he drew from those facts.[9] An evidentiary hearing is not required in these circumstances.

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[9]Petitioner's assertion (Pet. 11) that the Union misrepresented that it achieved higher wage rates than those paid by the Company was evaluated by the Director, who compared the Company's rates with those of See's Candy Shops, upon which the Union based its claim (*supra*, p. 7). This comparison showed that the Company had 7 job classifications similar to those contained in the See's contract, and that 20 out of 26 company employees in those job classifications were paid less than the wage rates in the See's contract (R. 98). Moreover, the See's contract provided for additional wage increases on May 1, 1970, and again on May 1, 1971, and for maintenance of certain above-scale wage rates for employees in the "more highly skilled classifications" (R. 98). Beyond disputing the conclusions drawn by the Director, the Company claimed simply that "substantial and material" factual issues existed; it did not specify

Nor is there merit to petitioner's contention (Pet. 16-18) that it was entitled to a hearing on its objections to the amendment to the Union's certification. The Company's response to the show cause order alleged no changes in the structure of the local beyond its change in affiliation, and did not contest the facts set forth by the Regional Director (R. 107-109). Accordingly, the court below correctly concluded that there was no flaw in the procedure followed by the Director (Pet. App. 2).[10]

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what they were or what specific evidence it had to support its allegations (R. 38-39; 98, n. 7). Such nebulous claims do not warrant an evidentiary hearing. See, *e.g.*, *National Labor Relations Board* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F. 2d 172, 178 (C.A. 6), certiorari denied, 389 U.S. 958; *Frito-Lay, Inc.* v. *National Labor Relations Board*, 422 F. 2d 169, 171 (C.A. 5); *Amalgamated Clothing Workers of America* v. *National Labor Relations Board*, 424 F. 2d 818, 828-829 (C.A. D.C.).

[10] *National Labor Relations Board* v. *Gebhardt-Vogel Tanning Co.*, 389 F. 2d 71 (C.A. 7), on which the Company relies (Pet. 16-17), does not disapprove of the use of a show cause procedure in the circumstances here. There, the court found that the Board resolved a disputed factual issue against the company without an evidentiary hearing. Here, the facts surrounding the change in affiliation were undisputed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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